



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 215 and 242**

**[Docket DARS-2021-0015]**

**RIN 0750-AK95**

**Defense Federal Acquisition Regulation Supplement: Requiring Data Other than Certified Cost or Pricing Data (DFARS Case 2020-D008)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2020 that provides additional requirements relating to the submission of data other than certified cost or pricing data.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2020-D008, using any of the following methods:

- o *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for "DFARS Case 2020-D008." Select "Comment" and follow the instructions to submit a comment. Please include your name,

company name (if any), and "DFARS Case 2020-D008" on any attached document.

- o *Email:* *osd.dfars@mail.mil*. Include DFARS Case 2020-D008 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** Mr. David E. Johnson, telephone 571-372-6115.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is proposing to amend the DFARS to implement section 803 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116-92), which amends 10 U.S.C. 2306a(d) as follows: to prohibit contracting officers from determining that the price of a contract or subcontract is fair and reasonable based solely on historical prices paid by the Government; and, when an offeror fails to make a good faith effort to comply with a reasonable request to submit data, to state that an offeror is ineligible for award if the contracting officer is unable to determine, by any other means, that the proposed prices are fair and reasonable, unless the head of the contracting activity (HCA) determines that it is in the best interest of the Government to make the award to that offeror.

## **II. Discussion and Analysis**

This rule proposes changes to DFARS 215.403-3(a). The amendment to 10 U.S.C. 2306a(d)(1) is implemented in DFARS 215.403-3(a)(1), by prohibiting contracting officers from basing the determination that the price of a contract is fair and reasonable solely on historical prices paid by the Government.

The new paragraph (d)(2) at 10 U.S.C. 2306a states that offerors who fail to comply with a reasonable request to submit data needed to determine price reasonableness are ineligible for award, unless the HCA determines that it is in the best interest of the Government to make the award. This requirement is already implemented in the Federal Acquisition Regulation (FAR) at 15.403-3(a)(4). However, the criteria in 10 U.S.C. 2306a(d)(2) for the determination made by the HCA are included in DFARS 215.403-3(a)(4), in lieu of the criteria in the FAR, because the criteria for DoD are not the same as the criteria for the civilian agencies.

In accordance with 10 U.S.C. 2306a(d)(2)(B)(ii), this proposed rule amends DFARS 242.1502(g), to add the requirement that, unless exempted by the HCA, a notation is required in the Contractor Performance Assessment Reporting System that, despite receiving an award, the contractor has denied multiple requests for submission of data other than certified cost or pricing data over the preceding three-year period.

This proposed amendment to the DFARS also makes conforming changes to 215.404-1.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items**

This rule does not propose to create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold or for commercial items, including COTS items.

### **IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

### **V. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of

Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the Federal Register. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

## **VI. Regulatory Flexibility Act**

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it does not add any new compliance requirements on small entities. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed rule is necessary in order to implement section 803 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020, which amends 10 U.S.C. 2306a(d).

The objective of this rule is to implement section 803 of the NDAA for FY 2020, which is the legal basis for this rule. Section 803 provides additional requirements for contracting officers and the head of the contracting activity relating to obtaining data other than certified cost or pricing data.

This rule does not directly impose requirements on small entities. The requirement making certain offerors ineligible for award is already in the Federal Acquisition Regulation (FAR). This rule impacts: (1) the contracting officer's need for data other than historical prices paid by the Government,

unless there is adequate price competition; and (2) the criteria for use by the head of the contracting activity for a determination to make an award. In some cases, the contracting officer's need for data other than historical prices paid by the Government may result in a request for additional data from an offeror. Based on data from the Federal Procurement Data System for FY 2018 through FY 2020, DoD estimates that 1,672 small entities may receive a request for additional data.

There are no new reporting, recordkeeping, or other compliance requirements on small entities.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no significant alternatives, which would accomplish the stated objectives of the rule and minimize the impact on small entities. However, the rule has no significant economic impact on small entities.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2020-D008), in correspondence.

## **VII. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

**List of Subjects in 48 CFR Parts 215 and 242**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 215 and 242 are proposed to be amended as follows:

1. The authority citation for parts 215 and 242 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 215—CONTRACTING BY NEGOTIATION**

2. Amend section 215.403-3 by adding paragraph (a) to read as follows:

**215.403-3 Requiring data other than certified cost or pricing data.**

\* \* \* \* \*

(a)(1) Contracting officers shall not determine the price of a contract to be fair and reasonable based solely on historical prices paid by the Government (see PGI 215.403-3(4)) (10 U.S.C. 2306a(d)).

(4) In accordance with 10 U.S.C. 2306a(d) and in lieu of the factors for consideration listed in FAR 15.403-3(a)(4), a determination by the head of the contracting activity that it is in

the best interest of the Government to make the award to an offeror that does not comply with a requirement to submit data other than certified cost or pricing data shall be based on consideration of pertinent factors, including the following:

(A) The effort to obtain the data.

(B) Availability of other sources of supply of the item or service.

(C) The urgency or criticality of the Government's need for the item or service.

(D) Reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract based on information available to the contracting officer.

(E) Rationale or justification made by the offeror for not providing the requested data.

(F) Risk to the Government if award is not made.

\* \* \* \* \*

3. Amend section 215.404-1 by revising paragraphs (b)(ii) and (v) introductory text to read as follows:

**215.404-1 Proposal analysis techniques.**

\* \* \* \* \*

(b) \* \* \*

(ii) If the contracting officer determines that the information obtained through market research is insufficient to determine the reasonableness of price, the contracting officer shall consider information submitted by the offeror of recent purchase prices paid by the Government and commercial customers for



the same or similar commercial items under comparable terms and conditions in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison. Price reasonableness shall not be based solely on historical prices paid by the Government (see 215.403-3(a)(1)). The contracting officer shall consider the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased (10 U.S.C. 2306a(b)(5)).

\* \* \* \* \*

(v) When evaluating pricing data, the contracting officer shall consider materially differing terms and conditions, quantities, and market and economic factors (see PGI 215.404-1(b)(v)). For similar items, the contracting officer shall also consider material differences between the similar item and the item being procured (see FAR 15.404-1(b)(2)(ii)(B)). Material differences are those that could reasonably be expected to influence the contracting officer's determination of price reasonableness. The contracting officer shall consider the following factors when evaluating the relevance of the information available:

\* \* \* \* \*

#### **PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES**

4. Revise section 242.1502 to read as follows:

**242.1502 Policy.**

(g) Past performance evaluations in the Contractor Performance Assessment Reporting System—

(i) Shall include an assessment of the contractor's performance against, and efforts to achieve, the goals identified in its comprehensive small business subcontracting plan when the contract contains the clause at 252.219-7004, Small Business Subcontracting Plan (Test Program); and

(ii) Shall, unless exempted by the head of the contracting activity, include a notation on contractors that have denied multiple requests for submission of data other than certified cost or pricing data over the preceding 3-year period, but nevertheless received an award (10 U.S.C. 2306a(d) (2) (B) (ii)).

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